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Taxpayer's Records and the Fifth Amendment - The Demise of Constructive Possession

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NOTES

TAXPAYER'S RECORDS AND THE FIFTH AMENDMENT—THE DEMISE OF CONSTRUCTIVE POSSESSION

The Internal Revenue Service directed a summons to petitioner's accountant to produce certain records and documents in his possession. Petitioner was undisputedly owner of the materials. In judicial proceedings to enforce the summons, petitioner intervened to bar enforcement, relying on the fifth amendment.[1] The United States Supreme Court *held* the fifth amendment ineffective to prevent production of petitioner's papers in possession of her accountant. *Couch v. United States*, 93 S. Ct. 611 (1973).

Section 7602 of the Internal Revenue Code authorizes the Secretary of the Treasury or his delegate to examine books, records, and other relevant data, and to issue summonses for the purpose of ascertaining the tax liability of any person.[2] Section 7604 provides the United States district courts with jurisdiction to compel production of materials and to enforce summonses.[3] To enhance the use of these sections, the Supreme Court in *Donaldson v. United States*[4] held that an Internal Revenue summons could be utilized to aid investigations of a criminal nature, provided issuance be "in good faith and prior to a recommendation for criminal prosecution."[5]

The individual taxpayer[6] may invoke the fifth amendment to prevent compulsory production of his private papers so long as he is

1. The petitioner further contended that enforcement of the summons would violate her fourth amendment right against unreasonable searches and seizures. The Court accepted the government's argument that the contention did "not appear to be independent of her Fifth Amendment argument." Couch v. United States, 93 S. Ct. 611 n.6 (1973).

See *United States* v. Powell, 379 U.S. 48 (1964), where the Supreme Court held that the Internal Revenue could secure enforcement of a summons without meeting the standard of probable cause.

2. For a general discussion of the Internal Revenue summons, see Comment, N.Y.U. 27TH INST. ON FED. TAX 1383 (1969).

3. INT. REV. CODE OF 1954, § 7604.

4. 400 U.S. 517 (1971). It is noteworthy that the Court in *Donaldson* rejected the dicta of *Reisman v. Caplin*, 375 U.S. 440 (1964) that a taxpayer could intervene as of right just because it is his tax liability under investigation.

5. 400 U.S. 517, 536 (1971).

6. The privilege against self-incrimination is personal in nature and may not be invoked by a corporation or association. United States v. White, 322 U.S. 694 (1944); Hale v. Henkel, 201 U.S. 43 (1906).

both owner and possessor.[7] If, however, the taxpayer's papers are summoned while in a third party's possession,[8] it is generally held that the owner may not bar production on fifth amendment grounds.[9] Nonetheless, a showing of *constructive possession* may enable the nonpossessing taxpayer to successfully assert his constitutional privilege.[10] Constructive possession may be present where an individual possesses papers *on behalf of the taxpayer*, but ultimate control and disposition of the materials remain with the taxpayer. For example, the courts have upheld a claim of constructive possession where materials are in possession of a bailee for safekeeping,[11] held by an attorney on behalf of the taxpayer,[12] and placed in another's possession for convenience of the Internal Revenue Service.[13] Thus, in *United States v. Tsukuno*[14] the district court refused enforcement of a summons to the taxpayer's accountant, holding taxpayer intervenor could validly invoke his fifth amendment privilege to prevent production of papers owned by him but in possession of his *agent*.

7. *See* Stuart v. United States, 416 F.2d 459 (5th Cir. 1969), and the cases cited therein. *See also* Boyd v. United States, 116 U.S. 616 (1886).

8. Formerly uncertainty existed when materials owned by a third party are in actual possession of the taxpayer. This situation typically arises when the accountant turns over his work product to the taxpayer, often just prior to issuance of a summons. Some cases have held that after commencement of an investigation, transfer of an accountant's work product will not change possession. United States v. Widelski, 452 F.2d 1 (6th Cir. 1971); United States v. Zakutansky, 401 F.2d 68 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969). *See also* United States v. Cote, 456 F.2d 142 (8th Cir. 1972); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961). Following this reasoning the taxpayer may not invoke his constitutional privilege, as he is considered to have neither ownership nor possession of the papers. However, in *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967), taxpayer successfully asserted his fifth amendment privilege in resisting production of his accountant's workpapers transferred to his possession prior to summons. The court reasoned that taxpayer's actual possession rather than his ownership of the incriminating materials was sufficient to support the privilege. *But see* United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *aff'd*, 274 F.2d 860 (3d Cir. 1959). Since the Couch opinion, the above conflict appears to have been settled in favor of the Cohen rationale.

9. United States v. Bowman, 236 F. Supp. 548 (M.D. Pa. 1964), *aff'd*, 358 F.2d 421 (3d Cir. 1966). *See generally* United States v. White, 322 U.S. 694 (1944); *In re* Magnus, 299 F.2d 335 (2d Cir. 1962).

10. *See* Donaldson v. United States, 418 F.2d 1213 (5th Cir. 1969); Comment, 38 BROOKLYN L. REV. 130 (1971).

11. United States v. Guterma, 272 F.2d 344 (2d Cir. 1959); Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956).

12. United States v. Judson, 322 F.2d 460 (9th Cir. 1963). *But see* United States v. White, 31 Am. Fed. Tax R. 2d 73-1151 (5th Cir. 1973).

13. Stuart v. United States, 416 F.2d 459 (5th Cir. 1969).

14. 341 F. Supp. 839 (E.D. Ill. 1972). *But see* United States v. Schoeberlein, 335 F. Supp. 1048 (D. Md. 1971).

It appears from the majority opinion in *Couch* that a taxpayer, by placing business records in possession of an accountant for a long and continuous period of time, may not bar enforcement of an Internal Revenue summons directed to the accountant. The *Couch* decision may have far-reaching implications.[15] Although disclaiming any intention to establish a "per se rule," it seems that with minor exception[16] the Court made actual possession a necessary element in order to invoke the fifth amendment privilege. Moreover, it was made clear that no accountant-client privilege exists in federal law. In addition, the Court concluded that "there can be little expectation of privacy," with respect to records kept for tax purposes.[17]

Relying on the fourth and fifth amendments, the Supreme Court in *Boyd v. United States*[18] had previously held that "any forcible and

15. *See* United States v. White, note 12 *supra*. In *White* the Fifth Circuit, relying on the Couch opinion, held that the privilege against self-incrimination afforded no protection to a taxpayer in regard to workpapers of his accountant in possession of the taxpayer's attorney. The court stated that "[t]he lesson to be drawn from *Couch*, then, is that unless the taxpayer is actually in possession of documents sought by the government—or clearly has constructive possession—he will be unable to seek the shelter of the fifth amendment because he will not be the object of . . . compulsion."

16. The Court offered the following exception to the rule of actual possession: "where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." 93 S. Ct. 611, 618 (1973). Mr. Justice Marshall dissented on the basis that the Court "seems to create a bright-line rule that no constitutional right of petitioner is violated by enforcing a summons of papers not in her possession." *Id.* at 623. *But see* the concurring opinion of Mr. Justice Brennan, who joined the majority "on the understanding that it does not establish a *per se* rule defeating a claim of Fifth Amendment privilege whenever the documents in question are not in the possession of the person claiming the privilege." *Id.* at 620. By virtue of the narrow exception contemplated in the majority opinion, it appears that for all practical purposes actual possession is a required element.

17. The Couch opinion offered the broad conclusion that "there can be little expectation of privacy . . . where obligations of disclosure exists." Justice Marshall in his dissent asserted that "privileged or not, a disclosure to an accountant is rather close [to] disclosure to an attorney." The Court's use of such language as "mandatory disclosure" is reminiscent of the decision in *Shapiro v. United States*, 335 U.S. 1 (1948). In *Shapiro*, the Court held that records required to be kept for governmental examination under the Emergency Price Control Act fall outside of the fifth amendment privilege. The Couch majority opinion makes no mention of *Shapiro*, but implications from the majority opinion may invite the Internal Revenue to urge application of the doctrine to income tax records. This war emergency measure should not be permitted to filter into the tax record area. *See* Stuart v. United States, 416 F.2d 459 (5th Cir. 1969); Beard v. United States, 222 F.2d 84 (4th Cir.), *cert. denied*, 350 U.S. 846 (1955).

18. 116 U.S. 616, 630 (1886). *Boyd* involved an attempt by the government to

compulsory extortion of a man's . . . private papers to be used as evidence to convict him" violates his constitutional rights. The *Couch* majority found the "pre-income tax" opinion of *Boyd* "did not . . . address or contemplate the divergence of ownership and possession."[19] The instant opinion relied on the decision of *Perlman v. United States*[20] for the proposition that compulsion and not ownership is the standard of the fifth amendment privilege. In situations where there exists divergence of possession and ownership, only the direct object of the compulsion may invoke the privilege, and then only if the materials may tend to incriminate him.

The apparent rationale of the *Couch* decision is that the summoning of papers in possession of an accountant exerts no compulsion on the taxpayer. However, recent judicial language could well have supported a contrary result. Dicta from a Fifth Circuit opinion affirmed by the Supreme Court offers the view that "the courts have deemed" the accountant's possession of the taxpayer's papers "as if they were in the possession of the taxpayer."[21] Thus, the element of compulsion would exist.[22] The *Couch* majority apparently felt that

compel a defendant partner to produce an invoice to be used against him in a forfeiture proceeding. "[I]t was assumed without discussion that an invoice for goods being imported by a partnership was the private paper of the defendant partner." Comment, U. So. CAL. 10TH TAX INST. 579, 585 (1958).

19. 93 S. Ct. 611, 617 (1973).

20. 247 U.S. 7 (1918). In *Perlman*, a corporate president introduced published exhibits in a patent infringement suit on behalf of the corporation. These exhibits were subsequently impounded by the court and the government sought possession for use against the president for perjury. The Supreme Court rejected the president's claim that transfer to the government of the exhibits owned by him would violate his fifth amendment privilege. As mentioned in *Couch*, the Perlman Court stated "the criterion of immunity [was] not the ownership of the property but the 'physical or moral compulsion' exerted." The Court in *Perlman* also recognized that "Perlman delivered the exhibits to publicity . . . ." 247 U.S. 7, 15 (1918). "[H]e claims the same sanctuary for the exhibits as though they were in his hands and had never been published or delivered to the world." *Id.* at 13. In light of the factual differences, the majority's reliance on *Perlman* may not be totally warranted. A corporate president's published materials in possession of a court clerk appears distinguishable from records of a taxpayer in possession of an accountant.

21. Donaldson v. United States, 418 F.2d 1213, 1214 (5th Cir. 1969), *aff'd*, 400 U.S. 517 (1971).

22. As Judge McLaren stated in *United States v. Tsukuno*, 341 F. Supp. 839, 842 (E.D. Ill. 1972), "[I]n asmuch as a taxpayer's privilege against self-incrimination extends to refusing to produce records in his own possession, it makes little sense to say that he has waived it by placing the *records in the possession of an agent* . . . a person's Fifth Amendment rights are not so lacking in substance that they disappear if a government agency can locate and subject to process records temporarily out of his immediate possession." (Emphasis added.) It is noteworthy that the Couch major-

such a result would "interfere with the legitimate interest of society in enforcement of its laws and collection of the revenues."[23]

In light of the *Couch* opinion, taxpayers and accountants alike will have to re-evaluate present practices. Written agreements that ownership of all materials shall remain with the taxpayer, and that possession by the accountant is only temporary, may prove helpful.[24] Moreover, the accountant should return all materials to the taxpayer immediately after his services are completed. Perhaps arranging the performance of the accountant's service on the taxpayer's business premises will avoid the *Couch* issue. The need for assistance in so complex a tax structure coupled with the right to be secure in one's private dealings with confidants, must be accorded its proper weight in balancing the interest of maintaining a consistent flow of revenue with our deeply rooted notion of governmental fair play.

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VERBAL ABUSE AND THE AGGRESSOR DOCTRINE

An argument arose between plaintiff and defendant. When defendant warned plaintiff not to use profanity in front of his wife, plaintiff replied that she heard worse every day from the defendant. As a result defendant struck plaintiff, who sustained injuries. The Louisiana supreme court *held*, words alone could not justify the striking, although they could be considered in mitigation of damages. *Morneau v. American Oil Co.*, 272 So. 2d 313 (La. 1973).

One of the curiosities of Louisiana tort law has been the so-called "aggressor" doctrine. The rule is said to be that "one who is himself in fault cannot recover damages for a wrong resulting from such fault, although the party inflicting the injury was not justifiable under the laws."[1] Thus recovery has been denied in suits for assault and battery where the plaintiff was found to have provoked the incident, even though the conduct of the defendant was not self-defense.[2] Sufficient provocation has been held to include, in addition to acts of physical violence, "insults, abuse, threats, or other conduct calculated to

ity opinion stressed the fact that the accountant was not the taxpayer's employee, but was an independent contractor.

23. 93 S. Ct. 611, 620 (1973).

24. *See* United States v. Re, 313 F. Supp. 442, 447 (S.D.N.Y. 1970).

1. Vernon v. Bankston, 28 La. Ann. 710, 711 (1876).

2. Fontenelle v. Waguespack, 150 La. 316, 90 So. 662 (1922).